No. 8781

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JESSE H. SHREVE and
ARCHIE C. SHREVE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' PETITION FOR REHEARING AND APPLICATION FOR STAY OF ISSUANCE OF MANDATE AND AFFIDAVIT IN SUPPORT THEREOF

LESLIE C. HARDY
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Phoenix, Arizona.

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TABLE OF AUTHORITIES CITED

CASES

TEXT BOOKS AND STATUTES

UNITED STATES CONSTITUTION

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TO THE HONORABLES, Francis A. Garrecht, Bert Emory Haney and Albert Lee Stephens, Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellants herein respectfully petition this Honorable Court for a rehearing of this cause, and for grounds thereof say:

I.

ASSIGNMENT OF ERRORS VIII TO XII, INCLUSIVE (BRIEF OF APPELLANTS, PPS. 41 TO 47, FIFTH SPECIFICATION PPS. 40-41) RE-

LATE TO THE ADMISSION IN EVIDENCE OF EXEMPLIFIED COPIES OF DEEDS, MORTGAGES, AND ASSIGNMENTS OF MORTGAGES. THESE ASSIGNMENTS OF ERROR ARE DISPOSED OF BY THE COURT AT PAGES 17 TO 20, INCLUSIVE, OF THE OPINION. THIS COURT ERRED IN DECIDING THAT THESE EXEMPLIFIED COPIES OF DEEDS, MORTGAGES, AND ASSIGNMENTS OF MORTGAGES WERE ADMISSIBLE IN EVIDENCE UNDER THE PROVISIONS OF SECTION 906 OF THE REVISED STATUTES (28 USCA, SEC. 688).

Appellants contend that the last mentioned statute (28 USCA, Sec. 688) has no application whatever to the exemplified copies of the deeds, mortgages and assignments of mortgages which were introduced in evidence by the Government against appellants, all of which are referred to in Assignments of Error VIII to XII, inclusive. The correct decision of this question is important to appellants. It is also important because it announces a rule of law which we believe is not only contrary to the statute itself, but also contrary to decisions of courts which have construed the statute, including the Supreme Court of the United States.

We have shown in the Brief of Appellants, beginning at pages 47 to 69, inclusive, that these deeds, mortgages, and assignments of mortgages were *an indispensable part of the case* for the Government. Their effect, after they were admitted in evidence, was so prejudicial that it is essential that it be determined beyond possibility of doubt that these instruments were properly admitted.

Section 688, 28 USCA, reads as follows:

"*Proofs of records in offices not pertaining to courts.* All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any *other* state or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the *said records* and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory or country, as aforesaid, from which they are taken."

The Supreme Court of the United States in *Atchison T. & S. F. Ry. Co. v. Sowers*, 213 U. S. 55, 29 Sup. Ct. Rep. 397, 53 L. Ed. 695, has held that Section 688, *supra*, was enacted for the purpose of giving effect to Section 1, Article IV of the Constitution. We tried to point this out at pages 9 and 10 of Appellants' Reply Brief. Lest there be any mistake, we quote from the *Sowers* case, beginning at page 64 of the U. S. Reports:

> "*To make effectual* the full faith and credit clause of the Constitution (Art. IV, Sec. 1) Congress passed the act of May 26, 1790, 1 Stat. 122, c. 11. This act made provision for the authentication of the records, judicial proceedings and acts of the legislatures of the several States, and provided that the same should have such faith and credit given them in every State within the United States as they have by law or usage in the courts of the State from which the records are or shall be taken. This act did not include the Territories.
>
> "On March 27, 1804, Congress passed an act extending the provisions of the former statute to the public acts, records, judicial proceedings, etc., of the Territories of the United States and countries subject to the jurisdiction thereof. 2 Stat. 298, c. 56. Those statutory enactments subsequently became Sections 905 and 906 of the Revised Statutes. Section 905 applies to judicial proceedings, and Section 906 to records, etc., kept in offices not pertaining to courts. * * *."

The Supreme Court of Georgia, in the case of

Slaten v. Hall, 172 Ga. 675, 158 S. E. 747, said:

> "Section 688, tit. 28 of the U. S. Code Annotated, which was created to carry into effect Article IV, Section 1, of the Federal Constitution * * *."

Section 1 of Article IV of the Federal Constitution provides as follows:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every *other* State. And the Congress may by general Laws prescribe the Manner in which *such* Acts, Records and Proceedings shall be proved, and the Effect thereof."

It will be observed that the constitutional provision provides that full faith and credit shall be given in each state to records *of every other state*, that is to say, foreign records. Section 688, *supra*, was enacted to carry into effect this constitutional provision in conformity with the last sentence of Section 1 of Article IV. Section 688 plainly provides that "all records * * * which may be kept in any public office of any state * * * not appertaining to a court * * * shall be admitted in any court * * * in any *other state*."

These deeds, mortgages and assignments of mortgages are not public records of another state, but they are records of public offices *within* the state of Arizona, which in this case is the state of the forum. Thus the statute itself points out the error of the Court in deciding that these deeds, mortgages and

assignments of mortgages were properly admitted in evidence.

The last sentence of Section 688 does not change the purpose and effect of the statute, because the last sentence which begins "And the *said records* * * *" must refer to the records mentioned in the first sentence of the statute.

Undoubtedly Section 688 refers only to foreign records. See note to *Wilcox v. Bergman* (Minn.) 5 L.R.A. (N.S.) 938. At page 945 of this note, the author cites *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437. That decision construed 1 Statutes at Large, Section 122, from which is derived R. S. Sec. 905 (Title 28, USCA, Section 687). This section differs only from Section 688 in that it pertains to legislative acts and judicial records. The *Turnbull* decision clearly discloses that the act there construed referred only to foreign records. See also *Adam v. Saenger*, 303 U. S. 59, 82 L. Ed. 649. The last mentioned case conclusively shows that R. S. 905 (28 USCA, Section 687) was enacted to carry into effect the full faith and credit clause of the Constitution, namely, Article IV, Section 1. Since Sections 687 and 688, Title 28, USCA, differ only in respect to the character of the records therein referred to *(A. T. & S. F. Ry. Co. v. Sowers, supra)*, it seems indisputable that both sections refer only to records of other states *and not to records of the state of the forum, as these here are.*

We had thought, as we said in the reply brief, that *Myres v. U. S.* (CCA 5) 256 Fed. 779, cited in the opinion, discussed a rule of procedure rather than a rule of evidence, but if we are mistaken, nevertheless

we contend that Section 688, as construed by the Supreme Court in the cases above cited, following Section 1 of Article IV of the Constitution, relates only to records of a state *other* than the state in which they are utilized. In its true application Section 688 applies to *foreign* records and not records of the state of the *forum.*

If we are correct in our contention, then we submit the Court has grievously erred in its opinion in this respect. If the Court concludes it has erred, then we respectfully urge that appellants are entitled to have these assignments of error (VIII to XII, inclusive) re-examined, as well as the argument and law presented in support thereof.

This Honorable Court, in quoting from the *Myres* case, *supra,* (page 19 of the Opinion) says:

> "It (Section 688) provides that such certified records 'shall have such faith and credit given to them in every court and office of the United States as they have by law or usage in the courts or offices of the state, territory or country as aforesaid, from which they were taken.' The effect of this provision is not an adoption of the rules of practice as to the preliminaries necessary to the introduction of certified records fixed by the state statutes but to give to such certified copies, when introduced, the like faith and credit that they are accorded in the courts of the state."

In the first place, in the *Myres* case, the Court had under consideration *a rule of practice* under the Texas law with reference to filing certified copies of

instruments before trial and notice to adverse parties of such filing. In Texas, where the case was tried, the state law required that certified copies should be filed three days before the trial and that notice of the filing be given to the adverse party. That situation is not analagous to the situation here, assuming that the *Myres* case correctly interprets Section 688, which we claim it does not. In the case at bar the lower court admitted in evidence exemplified copies of alleged deeds and mortgages *not taken from other states, but recorded within the state of the forum.* We contend as seriously as we know how that these exemplified copies should be admitted not under Section 688, which relates solely to the records of states *other* than the forum, but under the laws of *the forum,* i.e. the laws of Arizona. (See Brief of Appellants, and cases cited therein on pages 50 to 58, inclusive.) If these exemplified copies are not governed by federal statute, and we are sure they are not, then under the authorities cited in our opening brief, this Honorable Court must go to the laws of Arizona to determine the proof necessary to lay the foundation for the admissibility of these copies.

If the Court please, the quotation from the *Myres* case and the statute itself, definitely states (even if the statute were applicable) that they (the exemplified copies) shall be given such credit "as they have by law or usage in the courts of the state from which they are taken." So even if the statute by some method of reasoning is held to be applicable to cases tried in the forum where the exemplified copies originate, then they have to be introduced according to the law or usage in the court of the forum, i.e., Arizona. In short, using the last quoted portion of the *Myres*

case, they would not be afforded any faith or credit unless the proper foundation were laid. (See Arizona cases cited in our opening brief).

There would seem to be no question as to their inadmissibility under the laws of Arizona without the foundation first being laid. These exemplified copies are not primary evidence—they are at best secondary and, of couse, some showing should be made that the originals cannot be procured or that such deeds and mortgages were in fact executed (Jones on Evidence 4th Ed. Vol. 2 page 999, par. 523). There have been many cases where forged deeds and mortgages have been offered for recordation and actually recorded. This Court, of course, cannot take judicial knowledge that these mortgages and deeds were actually executed by the defendants or under their direction. The burden of proof cannot thus be shifted to defendants. The jury should not be permitted to guess as to the authenticity of these documents. Whatever else may be said, we are confident that this Honorable Court inadvertently misconstrued the purpose and effect of Section 688. Without these deeds and mortgages the Government has no case in the first instance, and even if it had a case, the bulk of the charge in the indictment is built around and sought to be proven by the introduction of these so necessary documents. That their admission is highly prejudicial goes without saying.

The same situation applies to the York mortgage (See page 95, Brief of Appellants). We need but call attention to this Court's opinion (page 26), wherein it is said:

> "The appellants contend the testimony of York was hearsay as to the defendants, and, therefore, inadmissible, *but, in view of the production of the exemplified copies of the mortgage, and of the deed* the connection between the letter of the daughter and two of the companies named in the indictment was established and testimony relative thereto was admissible."

Thus, it will be seen that the admission of this hearsay testimony is justified by the production of the *exemplified* copy of the mortgage from York and his wife to Security Building and Loan Association (Record 562). No foundation was laid for the admission of the exemplified copy of this mortgage and therefore it falls within the same category as the other exemplified copies of mortgages which we have discussed in this subdivision of this Petition for Rehearing. No foundation was even laid as provided at common law.

There is not one word of proof in the record that these defendants prompted the letter from York's daughter to him, or that these defendants knew that such a letter was written, or that they knew York and his wife executed and delivered a mortgage to Security Building and Loan Association. York's daughter testified (Record 560-562) that her husband (who is the co-defendant Perkins to whom a severance was granted and who testified against these defendants) had something for York to sign, which was the mortgage in question.

Undoubtedly, as appears from this testimony, Perkins was the originator of this fraudulent scheme and not these defendants. In view of this state of the

record, therefore, it appears obvious that this testimony was erroneously admitted. That it was prejudicial to these defendants is undeniable.

The same may be said as to Government's Exhibit 145, being an exemplified copy of a warranty deed allegedly executed by Arizona Holding Corporation, by A. C. Shreve, Vice-President, and Glen O. Perkins, Assistant Secretary, to A. E. Rayburn (Page 25, Opinion).

We feel convinced that this Honorable Court, upon a reconsideration of Section 688, will hold that it is not applicable here and that the evidence should not have been admitted without a proper foundation being laid, as provided by the statutes and the decisions of the highest court in Arizona.

II.

ASSIGNMENTS OF ERROR XIII TO XVI, IN-

SUPREME COURT OF THE UNITED STATES IN CHAFFEE & CO. v. U. S., 18 WALL. 516, 21 L. ED. 908.

> "The appellants contend the testimony of York was hearsay as to the defendants, and, therefore, inadmissible, *but, in view of the production of the exemplified copies of the mortgage, and of the deed* the connection between the letter of the daughter and two of the companies named in the indictment was established and testimony relative thereto was admissible."

Thus, it will be seen that the admission of this hearsay testimony is justified by the production of the *exemplified* copy of the mortgage from York and his wife to Security Building and Loan Association (Record 562). No foundation was laid for the admission of the exemplified copy of this mortgage and therefore it falls within the same category as the other exemplified copies of mortgages which we have discussed in this subdivision of this Petition for Rehearing. No foundation was even laid as provided at common law.

There is no proof in the record that these defendants prompted the letter addressed to York by his daughter, or that they knew such a letter was written, or that they knew York and his wife executed and delivered a mortgage to Security Building and Loan Association. York testified that his daughter wrote him (Record 560-562) that the company with which her husband (Perkins) was connected, had something for York to sign, which was the mortgage in question. Perkins was a co-defendant who was granted a severance and who testified against appellants.

Undoubtedly, as appears from this testimony, Perkins was the originator of this fraudulent scheme and not these defendants. In view of this state of the

record, therefore, it appears obvious that this testimony was erroneously admitted. That it was prejudicial to these defendants is undeniable.

The same may be said as to Government's Exhibit 145, being an exemplified copy of a warranty deed allegedly executed by Arizona Holding Corporation, by A. C. Shreve, Vice-President, and Glen O. Perkins, Assistant Secretary, to A. E. Rayburn (Page 25, Opinion).

We feel convinced that this Honorable Court, upon a reconsideration of Section 688, will hold that it is not applicable here and that the evidence should not have been admitted without a proper foundation being laid, as provided by the statutes and the decisions of the highest court in Arizona.

II.

ASSIGNMENTS OF ERROR XIII TO XVI, INCLUSIVE (BRIEF OF APPELLANTS, PAGES 68 TO 73, INCLUSIVE, EIGHTH SPECIFICATION, PAGE 68) RELATE TO THE ADMISSION IN EVIDENCE OF RECORDS OF FIRST NATIONAL BANK OF PRESCOTT, ARIZONA. THESE ASSIGNMENTS OF ERROR ARE DISCUSSED BY THE COURT AT PAGES 21 TO 24, INCLUSIVE, IN THE OPINION. THIS COURT ERRED IN DECIDING THAT THESE RECORDS WERE HARMLESS AND THAT THEY WERE ADMISSIBLE IN EVIDENCE UNDER ANY DECISION CONTRARY TO THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN CHAFFEE & CO. v. U. S., 18 WALL. 516, 21 L. ED. 908.

It is difficult to understand how this Honorable Court can conclude that the admission in evidence of these records of the First National Bank of Prescott was harmless. The trial court and counsel for the Government assuredly did not think so, because the record discloses that the Government utilized the witnesses Trott, Evans and Faulkner to identify these records and the transcript discloses that their testimony and these records embrace some fifty pages (See Transcript of Record, pages 294 to 343, Inc.,) It was impossible for appellants to assign as error all this testimony and the admission in evidence of all these records because of the limitation which this Court has placed upon the number of assignments of error.

As one factual illustration of the error of this Court in deciding that the admission in evidence of these records was harmless, we point out to the Court that three notes for $10,000.00 each were signed by Joseph E. Shreve, Glen O. Perkins and J. G. Cash, and endorsed by the defendant Jesse H. Shreve (Record 311). Not one of those notes was introduced in evidence. The Court itself concedes this to be a fact (Op. 22). But, more important than this, and as proof of the fraud alleged in the indictment, these personal notes of Joseph S. Shreve, Glen O. Perkins and J. G. Cash, *which were endorsed by the defendant Jesse H. Shreve*, were paid by funds of Security Building & Loan Association, one of the corporations named in the indictment and around which most of the fraudulent acts charged in the indictment gravitated. We submit, Your Honors, that evidence of this character cannot be harmless.

The rule of law announced in the case of *Chaffee & Co. v. U. S., supra,* does not admit of the introduction of these records of First National Bank of Prescott against these defendants. This is particularly true, because (1) the record affirmatively shows that these defendants had no connection whatever with the First National Bank of Prescott; because (2) the First National Bank of Prescott is not mentioned in the indictment; and because (3) the First National bank of Prescott is not mentioned in the Bill of Particulars; because (4) there is no proof in the record that defendants, or either of them, had any control or supervision of the records of that bank.

Now, if it can be logically and lawfully asserted that, notwithstanding what we have said, as supported by the bill of exceptions, that these records of a banking association wholly disassociated from these defendants were properly admitted in evidence under the decision in *Wilkes v. U. S.*, 80 Fed. (2d) 285, decided by this Court, then we contend that that case has *overruled* the decision of the Supreme Court of the United States in *Chaffee & Co. v. U. S., supra.* If this Court in the *Wilkes* case has not expressly overruled the decision of the Supreme Court in the *Chaffee* case, then certainly in its application to this case, the rule of law announced there by the Supreme Court of the United States has been refined away.

This Honorable Court says at page 23 of the Opinion, that "It was believed, in an earlier age, that books of third parties were not admissible in evidence upon the ground of *res inter alios acta,* but there is a broader view now taken and the rule is somewhat relaxed * * *". If that rule is relaxed it has been

relaxed by this Court and not by the Supreme Court of the United States.

But more than that, this Court at page 24 of the Opinion quotes from the former opinion in this case (77 Fed. (2d) 2, 7) to the effect that it was then laid down as a rule of decision on the *retrial* of this case, that in order to make these books of the First National Bank of Prescott admissible against these defendants that "it is *essential* to show that the defendants made such entries or caused them to be made, or assented thereto." The record in this case shows no such thing.

Now, it seems to us, and respectfully of course, that this Court by the present opinion not only has refined away a rule of evidence as laid down by the Supreme Court of the United States, but that it has wholly retracted a rule of decision which was made by this Court on the former appeal and upon which these defendants were entitled to rely upon this trial of the case. In a criminal case there certainly should be more security than this with respect to a rule of evidence projected by this Honorable Court for the benefit of defendants and upon which they were entitled to and did rely.

III.

ASSIGNMENTS OF ERROR XXVI AND XXVII (BRIEF OF APPELLANTS 87 TO 89, INCLUSIVE, TENTH SPECIFICATION, PAGE 87) RELATE TO THE ADMISSION IN EVIDENCE OF A MORTGAGE EXECUTED BY WILLIAM H. PERRY, AND A SHERIFF'S DEED EXECUTED PURSUANT TO THE FORECLOSURE OF THAT

MORTGAGE. THESE ASSIGNMENTS OF ERROR ARE DISPOSED OF BY THE COURT ON PAGE 25 OF THE OPINION. THE COURT ERRED IN DECIDING THAT THE PERRY MORTGAGE AND THE SHERIFF'S DEED WERE ADMISSIBLE IN EVIDENCE.

Perry, as the Opinion discloses, executed a mortgage to the Yavapai County Savings Bank. Neither that bank nor the mortgage is mentioned in the indictment or in the bill of particulars. The witness Russell testified with respect to the mortgage and the sheriff's deed. Perry did not testify and neither did the sheriff. The defandants had no connection whatever with the Yavapai County Savings Bank and as far as the record discloses *they never knew such a bank existed.* The effect of Russell's testimony was to show, as the opinion discloses (Page 25), that the property which was mortgaged by Perry to Yavapai County Savings Bank was the same property described in Exhibit 145, which was an *exemplified copy* of a warranty deed executed by *Arizona Holding Corporation* to A. E. Rayburn.

Here again, with respect to damaging testimony, exemplified copies of instruments were introduced in evidence, without the Government laying any foundation whatever for their admission.

But more than this, a fraudulent transaction was proved by records of a person and a bank over which the defendants had no *control or connection* whatever. Insofar as this record discloses they never knew that Perry had executed a mortgage to Yavapai County Saving Bank.

We submit, Your Honors, that these assignments of error violate every reason supporting the rule against hearsay evidence. We can conceive, as stated by the Court, why it is not "impressed with our argument" (Opinion, page 25) but we are unable to understand why the Court is not impressed with our authorities (Appellants' Brief, pages 91 to 93). It seems to us, in view of the assignments of error, and the record, that it should be unnecessary to cite authorities to support assignments of error that the admission of testimony and evidence of this character is violative of every reason for the rule against hearsay evidence, particularly in criminal cases.

IV.

We have noted this statement of the Court:

> "However puzzling may have proven some of the problems presented in the preceding pages, this particular argument (i.e., the sufficiency of the evidence) precipitates no mystery. The record overflows with proof of appellants' guilt."

Undoubtedly that appraisal by the Court has magnified the difficulties which appellants have encountered to convince this Court that the misapplication of wholesome principles of law often require that judgments be reversed notwithstanding guilt. If, as we think is the case here, rules of evidence which have long been recognized and often applied are to be discarded, but if not discarded refined away, then appellants are singularly deprived of rights which they thought they could rely upon. We feel that the errors which we have pointed out in this Motion for a Rehearing are sufficiently substantial and important, at least to those who will follow, that this Court

should again re-examine the assignments of error pertaining to them. It is not our purpose to request this Court to again re-examine all the assignments of error, and the whole brief in connection with them, but we do believe that this Court has committed fundamental error in the following respects:

(1) That it has misconstrued 28 USCA, Sec. 688, by holding that the deeds, mortgages, and assignments of mortgages, discussed in Subdivision I hereof, were admissible in evidence.

(2) In deciding that the records of First National Bank of Prescott, discussed in Subdivision II hereof, were admissible in evidence, and that they were harmless.

(3) In deciding that the Perry mortgage executed to Yavapai County Savings Bank, and the Sheriff's Deed on foreclosure thereof, and the testimony of the witness Russell in relation thereto, discussed in Subdivision III hereof, were admissible.

CONCLUSION

For all the foregoing reasons, it is respectfully contended that a rehearing of this cause be granted and that, if it comports with the wishes of the Court, these appellants be permitted to brief additionally the questions raised by this Motion for Rehearing, and that they be permitted to have oral argument thereon.

Respectfully Submitted,

LESLIE C. HARDY,

LOUIS B. WHITNEY.
Attorneys for Appellants and Petitioners.

No. 8781

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JESSE H. SHREVE and
ARCHIE C. SHREVE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPLICATION FOR STAY OF ISSUANCE OF MANDATE

TO THE HONORABLES, FRANCIS A. GARRECHT, BERT EMORY HANEY, AND ALBERT LEE STEPHENS, JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:

I.

That on the 18th day of April, 1939, this Honorable Court rendered and entered its opinion herein by which it affirmed the judgment of the United States District Court for the District of Arizona, from which petitioners had duly and regularly appealed.

II.

That petitioners intend to and will petition the Supreme Court of the United States for a Writ of Certiorari to review the opinion and judgment of this Honorable Court and will file said Petition for said Writ of Certiorari in the Supreme Court of the

United States within thirty (30) days after the entry of the judgment of this Honorable Court following the final determination of the Petition for Rehearing which has been filed herein by the petitioners in the event said Petition for Rehearing is denied, and that they will in all respects comply with the rules of the Supreme Court of the United States regulating the filing of petitions for writs of certiorari therein.

III.

The undersigned counsel for petitioners believe that good and sufficient reasons exist for the issuance by the Supreme Court of the United States of a Writ of Certiorari, in the event said Petition for Rehearing is denied, and the final judgment of this Court is rendered and entered, as said reasons are provided by law and by the rules of the Supreme Court of the United States.

WHEREFORE, petitioners pray that this Honorable Court stay its mandate herein until said Petition for Rehearing is disposed of and said Petition for Writ of Certiorari shall have been filed in the Supreme Court of the United States.

Respectfully submitted,

LESLIE C. HARDY,

LOUIS B. WHITNEY.
Attorneys for Appellants and Petitioners.

CERTIFICATE OF COUNSEL

We, the undersigned, counsel for appellants and petitioners herein, do certify that in our opinion the foregoing Petition for a Rehearing is well founded and meritorious and that neither said petition or said Application for Stay of Issuance of Mandate are interposed for the purpose of delay.

LESLIE C. HARDY,

LOUIS B. WHITNEY.
Attorneys for Appellants and Petitioners.

No. 8781

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JESSE H. SHREVE and
ARCHIE C. SHREVE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

AFFIDAVIT OF JESSE H. SHREVE AND ARCHIE C. SHREVE, APPELLANTS AND PETITIONERS, IN SUPPORT OF APPLICATION FOR STAY OF ISSUANCE OF MANDATE.

UNITED STATES OF AMERICA
STATE OF CALIFORNIA
COUNTY OF SAN DIEGO
} ss.

JESSE H. SHREVE and ARCHIE C. SHREVE, first being sworn, upon oath depose and say:

That they are the appellants and petitioners herein and make and file this affidavit in support of their Application for Stay of Issuance of Mandate herein.

Affiants depose and say that they, through their counsel, Leslie C. Hardy, Esq. and Louis B. Whitney, Esq., will file in the Supreme Court of the United States a Petition for a Writ of Certiorari to review the opinion of this Honorable Court rendered and filed herein on the 18th day of April, 1939, in the event their Petition for Rehearing filed herein is denied and final judgment is entered herein affirm-

ing the judgment of the United States District Court for the District of Arizona.

Affiants further depose and say that neither said Petition for Rehearing, nor said Application for Stay of Issuance of Mandate, nor said Petition for Writ of Certiorari, in the event a Petition for Writ of Certiorari is filed in the Supreme Court of the United States, are interposed for the purpose of delay, but that they are interposed solely in order that affiants may enforce the rights and remedies accorded to them by the Constitution and laws of the United States, the rules of this Court, and the rules of the Supreme Court of the United States in order to preserve their liberty.

JESSE H. SHREVE,

ARCHIE C. SHREVE.

Subscribed and sworn to before me this ..... day of May, 1939.

.....

Notary Public

My commission expires:

Service of two copies of the within Petition for Rehearing, Stay of Issuance of Mandate, and Affidavit of Jesse H. Shreve and Archie C. Shreve in support of Application for Stay of Issuance of Mandate, is admitted this ..... day of May, 1939.

FRANK E. FLYNN,
United States Attorney.

By.....